In the

Supreme Court of the United States

October Term, 1963

No. 1169

LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL.,

Appellants,

v.

HARRISON MANN, ET AL.,

Appellees.

STATEMENT OF JURISDICTION

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February 7, 1963

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STATEMENT OF JURISDICTION

I.

OPINION OF THE COURT BELOW

The opinion of the three-judge United States District Court for the Eastern District of Virginia, at Alexandria, is reported at ..... F. Supp. ..... (1962) as *Mann* v. *Davis* and is found, together with the dissenting opinion, as Appendix I to this statement.

II.

THE JURISDICTION OF THE COURT

1. The case below was brought by the appellees seeking (a) a judgment declaring Sections 24-12 and 24-14 of the

Code of Virginia, as amended (the Apportionment Acts of 1962), unconstitutional and void, (b) an injunction restraining the appellants from conducting elections under these sections and (c) an apportionment by the court below if the General Assembly of Virginia should fail, after an injunctive decree, to reapportion the State in conformity with legal standards. A three-judge court was convened pursuant to 28 U. S. C. Sections 2281 and 2284 and jurisdiction was invoked under 28 U. S. C. Section 1343(3). This appeal is taken from the judgment of the three-judge court declaring the two state statutes to be unconstitutional and enjoining the enforcement thereof. The statute pursuant to which this appeal is brought is 28 U. S. C. Section 1253.

2. The date and time of entry of the judgment sought to be reviewed by this appeal is November 28, 1962. The notice of appeal was filed in the United States District Court for the Eastern District of Virginia, at Alexandria, on December 10, 1962.

3. Section 1253 of Title 28, U. S. C. confers on this Court jurisdiction of this appeal and reads as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (June 25, 1948, c. 646, 62 Stat. 926).

4. The following cases sustain the jurisdiction of this Court:

(a) *St. John* v. *Wisconsin Employment Relations Board*, 340 U. S. 411, 414 (1951);

(b) *Palmetto Fire Insurance Co.* v. *Conn*, 272 U. S. 295, 305 (1920); and

(c) *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959).

5. The validity of two state statutes is involved. Chapter 635, Acts of the General Assembly of Virginia, 1962, p. 1266, codified as Section 24-14 of the Code of Virginia, as amended, 1962 Cumulative Supplement, Volume 5, pp. 137, 138, divided the state into thirty-six (36) senatorial districts. Chapter 638, Acts of the General Assembly of Virginia, 1962, p. 1269, codified as Section 24-12 of the Code of Virginia, as amended, 1962 Cumulative Supplement, Volume 5, pp. 135, 136, 137, created seventy (70) house districts and distributed and apportioned the one hundred (100) members of the House of Delegates throughout such districts for purposes of representation. Due to the length of these statutes they are not here set out verbatim. Their text is set forth as Appendix II to this statement.

III.

THE QUESTIONS PRESENTED

1. Should the court below have declined to entertain jurisdiction in this case in the exercise of its discretion conformably with the doctrine of abstention?

2. Did the court below err in declaring and adjudging that Chapters 635 and 638, Acts of the General Assembly of Virginia, 1962, denied the appellees and those persons similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States?

IV.

STATEMENT OF THE CASE

As previously mentioned, this case was heard before a statutory three-judge court on the complaints of the appellees seeking declaratory judgments and permanent injunctions against the enforcement and operation of certain statutes enacted by the General Assembly of Virginia.

The original and intervening plaintiffs below are registered and qualified voters of the Commonwealth of Virginia residing, respectively, in Arlington County, Fairfax County and the City of Norfolk. The appellants are the Secretary of the State Board of Elections, the members thereof, and various local elections officials of Arlington County, Fairfax County, and the City of Norfolk, Virginia.

As pointed out, the judgment of the court below, attached as Appendix III of this statement, declared Sections 24-12 and 24-14 of the Code of Virginia, as amended, to be unconstitutional and void. The appellants were also restrained and enjoined from proceeding under or pursuant to the said sections, but the enforcement of the injunction was stayed until January 31, 1963, so that (1) the General Assembly of Virginia could be called and convened in special session "to enact appropriate reapportionment statutes under the Constitution of Virginia and the Constitution of the United States" or so that (2) during the said suspension the appellants might appeal to this Court for review.

Upon the application of the appellants, the execution and enforcement of the judgment of the court below was stayed pending the perfection of this appeal and the final disposition of such appeal by this Court, pursuant to the order of the Chief Justice entered on December 15, 1962.

The only evidence introduced by the appellees in the court below, which might be considered material, dealt with popu-

lation figures. It may be summarized by quoting from the opinion of the majority below:

"THE SENATE

"The disparities in the Senate found in the 1962 apportionment acts are pointed up by the plaintiffs' evidence as follows:

"A citizen of Arlington, Fairfax, or Norfolk has representation or voting power in the Senate of *less* than ½ of that possessed by a citizen of any of 6 of the 33 remaining districts in the State. Putting it conversely, his voting power is more than 2-times the voting power of any of the plaintiffs. Further, in 5 more of the districts the power of each vote is *almost twice* that of any plaintiff on an average. Thus ⅓ of the other 33 senatorial districts are nearly 100% richer in each vote's worth than are the plaintiffs' districts.

"In substantiation of this summary the plaintiffs offered in evidence these figures:

"Virginia's 1960 population is 3,966,949. Dividing this total by the number of Senators—40—gives an ideal respresentation of one Senator for each 99,174 persons.

	Arlington	Fairfax	City of Norfolk
"Population	163,401	285,194	304,869
No. of Senators	1	2	2
Population per Senator	163,401	142,597	152,435

District	Population	No. of Senators	Population Per Senator
Brunswick Lunenburg Mecklenburg	61,730	1	61,730

District	Population	No. of Senators	Population Per Senator
Goochland Louisa Orange Spotsylvania City of Fredericksburg	62,523	1	62,523
Culpeper Fauquier Loudoun	63,703	1	63,703
Clarke Frederick Shenandoah City of Winchester	66,818	1	66,818
Halifax Charlotte Prince Edward City of South Boston	67,100	1	67,100
Dickenson Wise City of Norton	68,803	1	68,803
Bland Giles Pulaski Wythe	72,434	1	72,434
Greensville Prince George Surry Sussex Hopewell	72,951	1	72,951
Norfolk County City of South			

District	Delegates	Population	Population Per Delegate
Norfolk (Now City of Chesapeake)	73,647	1	73,647
Dinwiddie Nottoway City of Petersburg	74,074	1	74,074
Appomattox Buckingham Cumberland Powhatan Amherst Nelson Amelia	76,652	1	76,652

Total: 11 districts

"HOUSE OF DELEGATES

"In the House plaintiffs contend that a vote in Fairfax has less than ¼ of the voting force of a vote in 4 districts; ⅓—or less than that—of a vote in at least 16 others; and thus the preferred districts amount to a total of 20 of the other 67 districts in the State. In addition, both Norfolk and Arlington have almost double the individual vote-weight of Fairfax; but these two have only approximately ½ the ballot-potency of 7 districts. The following figures have been adduced to vouch the contention.

"With the State population at 3,966,949 each of the 100 Delegates would presumably represent 39,669 persons.

	Arlington	Fairfax	City of Norfolk
"Population	163,401	285,194	304,869
No. of Delegates	3	3	6
Population per Delegate	54,467	95,064	50,812

District	Delegates	Population	Population Per Delegate
Shenandoah	1	21,825	21,825
Wythe	1	21,975	21,975
Grayson	1	22,644	22,644
Bland	1	23,201	23,201
Loudoun	1	24,549	24,549
Gloucester	1	25,359	25,359
Franklin	1	25,925	25,925
Rockingham	2	52,401	26,200
Buckingham	1	26,385	26,385
Southampton	1	27,195	27,195
Pulaski	1	27,258	27,258
Charlotte	1	27,489	27,489
Alleghany	1	28,458	28,458
Greensville	1	28,566	28,566
Pittsylvania	2	58,296	29,148
Fluvanna	1	29,392	29,392
City of Charlottesville	1	29,427	29,427
Fauquier	1	29,434	29,434
City of Petersburg	2	58,933	29,466
Amelia	1	29,703	29,703
Total: 20 districts"			

The appellants introduced twelve (12) exhibits in the court below. They may be summarized as follows:

1. Defendants' Exhibit No. 1, which is the annual report of the Virginia Alcoholic Beverage Control Board, shows, beginning on page 48, the number of incorporated towns located in the various counties of Virginia.

2. Defendants' Exhibit No. 2, a letter of Mr. Richard M. Scammon, Director of the Bureau of Census, dated September 26, 1962, certified that the number of males 14 years and over in the labor force reported as in the armed

forces as of April 1, 1960, for the county of Arlington, Virginia, was 10,628.

3. Defendants' Exhibit No. 3 shows the population of each State according to the 1960 census, the number of electors allotted to each State and the population per elector based upon the 1960 census. The smallest population per elector exists in Alaska, with 88,722 inhabitants per elector; the largest population per elector exists in California with 392,930 inhabitants per elector. In several other states, i.e., Florida, Illinois, Indiana, Massachusetts, Michigan, Pennsylvania and Texas, the population variance per elector as compared to Alaska is substantially as great as that which exists between California and Alaska.

4. Defendants' Exhibit No. 4 contains apportionment data of New York State as shown by the opinion of the three-judge District Court in *W.M.C.A., Inc.* v. *Simon*, 208 F. Supp. 368. This data shows the population variance ratio between the largest and smallest Senate and Assembly districts in New York based upon population. The largest Senate district has a population of 666,784; the smallest Senate district had a population of 168,398—a population variance ratio of approximately 3.96 to 1. The largest Assembly district had a population of 222,261; the smallest Assembly district had a population of 15,044—a population variance ratio of approximately 14.1 to 1.

5. Defendants' Exhibits Nos. 5 and 6 show the rank order of Virginia in comparison with other States, based upon population, before and after the 1962 reapportionment statutes were enacted by the General Assembly of Virginia. *These exhibits were prepared by the Bureau of Public Administration of the University of Virginia and Exhibit No. 5 established that Virginia ranks eighth in the United States*

in fair representation, based solely on population, subsequent to the 1962 reapportionment legislation.

6. Defendants' Exhibits Nos. 7, 8, 9 and 10 compare rural and urban representation in the Senate and House of Delegates of Virginia and establish that no discrimination exists in favor of rural areas as against urban areas.

7. Defendants' Exhibits No. 11, United States Census of Population, 1960 (Virginia) gives the total military personnel in Virginia at page 48-395. Table 115 (page 48-403) indicates that the number of persons fourteen years of age and over residing in Fairfax County and in the armed forces of the United States totals 16,693.

8. Defendants' Exhibit No. 12 is a statement made by the Governor of Virginia when he signed the 1962 reapportionment statutes of Virginia, now codified as Sections 24-12 and 24-14 of the Virginia Code.

V.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The three-judge court below decided questions of such substantial nature as to require plenary consideration by this Court, with briefs on the merits and oral argument, for their resolution for the following reasons:

A.

The Court Below Should Have Declined to Entertain Jurisdiction in This Case in the Exercise of Its Discretion Conformably With the Doctrine of Abstention.

The doctrine of equitable abstention is involved here and it is only necessary to examine the majority and minority

opinions of the court below to conclude that a substantial question is raised by this appeal. The decision of the majority would appear to be clearly in conflict with many decisions of this Court and with decisions of federal district courts.

It is conceded that the appellees have an appropriate and adequate remedy in the state courts of Virginia. *Brown* v. *Saunders*, 159 Va. 28, 166 S. E. 105 (1932) and *Baker* v. *Carr*, 369 U. S. 186 (1962). It must also be conceded that this case involves an area which vitally affects the independence of state governments, for without Sections 24-12 and 24-14 of the Code of Virginia, as amended, the Commonwealth of Virginia could not function. Under such circumstances, the doctrine of equitable abstention must be applied, or discarded as a time-honored principle of equity. Yet, the majority of the court below held that "abstention is not appropriate here." Its only authority was *Baker* v. *Carr*, *supra*, as interpreted in *Toombs* v. *Fortson*, 205 F. Supp. 248 (N. D. Ga., 1962).

Baker v. *Carr* did not hold that abstention is not appropriate in apportionment cases. As Mr. Justice Stewart, in his concurring opinion, emphasized (369 U. S. 265):

> "The Court today decides three things and no more: '(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) * * * that the appellants have standing to challenge the Tennessee apportionment statutes.' * * *." See also, 369 U. S. 197-198.

The majority below, in holding that the doctrine of abstention should not be applied in apportionment cases, also ignored such decisions (and the facts and circumstances surrounding them) as *Remmey* v. *Smith* (D. C. E. D., Penn., 1951), 102 F. Supp. 708, app. dism. 342 U. S. 916;

Lein v. *Sathre* (D. C. N. D. S. W. Div., Jan. 29, 1962), 201 F. Supp. 535 and (May 31, 1962) 205 F. Supp. 536; *Lisco* v. *McNichols* (D. C. Col., Aug. 10, 1962), 208 F. Supp. 471; *Wisconsin* v. *Zimmerman* (D. C. W. D. Wis., Aug. 14, 1962), 209 F. Supp. 183; and *League of Nebraska Municipalities* v. *Marsh* (D. C. Neb., July 20, 1962), 209 F. Supp. 189.

The facts and circumstances surrounding this case are entirely different from those involved in apportionment decisions handed down since *Baker* v. *Carr, supra.*

1. The General Assembly of Virginia has faithfully followed the mandate to reapportion found in section 43 of the Virginia Constitution of 1902, as amended.[1]

2. The appelles have an adequate remedy in the courts of this state. *Brown* v. *Saunders, supra.*

3. The courts of this state have not refused to consider the relief requested by the appelles.

4. Section 43 of the Virginia Constitution[2] has not been

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[1] Since 1900 the House of Delegates has been reapportioned by the following acts: Acts of 1906, p. 84; Acts of 1910, p. 9; Acts of 1922, p. 463; Acts of 1923, p. 17; Acts of 1932, p. 337; Acts of 1942, chapt. 387; Acts of 1948, p. 803; Acts of 1952, Ex. Sess., chapt. 18; Acts of 1958, chapt. 33; and Acts of 1962, chapt. 638.

Since 1900 the Senate of Virginia has been reapportioned by the following acts: Acts of 1901-2, p. 800; Acts of 1922, p. 463; Acts of 1923, p. 17; Acts of 1934, p. 252; Acts of 1942, chapt. 387; Acts of 1948, p. 805; Acts of 1952, Ex. Sess., chapt. 17; Acts of 1958, chapt. 333; and Acts of 1962, chapt. 635.

[2] The provision of the Virginia Constitution pursuant to which §§ 24-12 and 24-14 of the Code of Virginia, as amended, were enacted reads:

> "§ 43. Apportionment of Commonwealth into senatorial and house districts. The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter."

construed by the state courts and construction thereof is vital to a final determination of the issue presented by the appellees.

5. A serious federal constitutional question may be avoided by invoking the doctrine of abstention in this case.

Without doubt, the facts and circumstances set forth above required the majority below, in the exercise of discretion, to abstain from hearing this case on its merits. The decisions of this Court support this position. *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935); *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949); *Government & C.E.O.C., CIO* v. *Windsor*, 353 U. S. 364 (1957); *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959); *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U. S. 25 (1959); and *Martin* v. *Creasy*, 360 U. S. 219 (1962). Compare, *Alleghany* v. *Mashuda*, 360 U. S. 185 (1959).

As a matter of law, few public interests have a higher claim upon the discretion of a federal chancellor than avoidance of needless friction between state and federal governments and avoidance of federal constitutional questions which may become unnecessary to consider because of state judicial construction. Consistent with these fully precedented principles, the doctrine of abstention should have been applied by the majority below.

Compare, § 55 of the Constitution of Virginia which requires the congressional districts to be "composed of contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants."

B.

The Reapportionment Statutes of Virginia Do Not Deny Equal Protection of the Laws in Contravention of the Fourteenth Amendment of the Constitution of the United States.

The majority of the court below found "unconstitutional, invidious discrimination" adverse to Arlington, Fairfax and the City of Norfolk. It was held that the appellees had proved inequities on the basis of population and that the appellants had not carried the burden of adducing evidence which might explain such inequities. By this holding, the majority not only ignored the evidence introduced by the appellants in the court below, but also refused to apply the principle, long established by this Court, that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961); and *Baker* v. *Carr*, *supra*.

Military Personnel

The constitutions of such states as Washington, Wisconsin and South Dakota provide that military personnel should be excluded from the population figures used to determine apportionment of the state legislatures. See, 17 Law and Contemporary Problems, p. 366 and 43 Mich. L. Rev. 1091 et seq.

Section 24 of the Constitution of Virginia provides that "no officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to right of sufferage in the State, or in any county, city or town thereof, by reason of being stationed therein; . . ."

Evidence on behalf of defendants established that the total male military personnel residing in Arlington County

was 10,628. Of course, many men in the armed forces are married and have children and, while it is a question of judgment, it is surely reasonable to multiply the number of males by 2½ to obtain a total figure for military personnel, their wives and children residing in Arlington County. It was legally permissible for the General Assembly of Virginia, in considering reapportionment, to exclude military personnel, their wives and children located in Arlington County. Multiplication of the figure 10,628 by the figure 2½ produces a total of 26,570. The 1960 census for Arlington County shows a population of 163,401. Subtracting the former figure from the latter leaves the figure of 136,831 as the correct population of Arlington County to be considered for apportionment purposes.

Using the population figures as adjusted above, the correct population for Arlington County per Senator (Arlington County has one Senator) is 136,831. Under the 1962 reapportionment act, Arlington has three delegates, and dividing a total population of 136,831 by three gives a population of 45,610 per delegate, as opposed to 54,467 inhabitants per delegate as found by the majority below. These figures compare favorably with the "ideal representation" figures of one Senator for each 99,174 persons and one Delegate for each 39,669 persons. This is especially true when one considers that Arlington County is an extremely small, densely populated county, having an area of only twenty-four square miles (less than half the size of the city of Norfolk), and that elected representatives of Arlington County represent only one political subdivision (the county itself) which contains only one governing body, one school board and one set of constitutional officers.

Similar adjustment of the population figures of Fairfax County to exclude military personnel indicates that Fairfax County would have 115,471 persons per Senator and 76,980

persons per Delegate, rather than 142,597 persons per Senator and 95,064 persons per Delegate as set forth in the majority opinion. These figures also compare favorably to the "ideal representation" figures when one considers that the district comprising Fairfax County, Fairfax City and the City of Falls Church has an area of only 407 square miles, while other districts which are less heavily populated have areas ranging up to 2776 square miles.

Similar adjustment of the population figures for the City of Norfolk to exclude military personnel indicates that Norfolk has 93,148 persons per Senator and 31,049 persons per Delegate. Thus, with military personnel excluded, *Norfolk is actually over-represented in both the Senate and House of Delegates on a strict population basis.*

If the 1960 census figures are adjusted for military personnel, their wives and children, the variance in population between the areas in which appellees reside and other areas of the State is considerably reduced. Was the majority of the court below justified in ignoring these adjusted figures when it found "invidious discrimination" to exist with respect to the inhabitants of Arlington County, Fairfax County and the City of Norfolk? Appellants submit that this question, which lies at the very heart of this case, is a substantial federal question which should be considered by this Court.

Representation in the Electoral College

Defendants' Exhibit No. 3 indicates that, in the Electoral College, the smallest population per elector exists in the State of Alaska which has 88,722 inhabitants per elector, while the largest population per elector exists in California which has 392,930 inhabitants per elector—a population variance ratio of 4.4 to 1 as between California and Alaska.

Based solely upon population, *including military personnel, their wives and children*, the most excessive population variance ratio in the House of Delegates of Virginia is 4.36 to 1, while the most excessive variance ratio in the Senate of Virginia is 2.65 to 1. Thus, it is clear that, even including military personnel, no population variance ratio in either the House of Delegates or Senate of Virginia exceeds the population variance ratio which exists in the Electoral College. Can individious discrimination exist in a State apportionment system which contains no population variance ratio which exceeds that of the Electoral College? Appellants submit that this is a substantial federal question which should be considered by this Court.

Conflict With Other Decisions

In the landmark opinion in *Baker* v. *Carr, supra*, the individual members of this Court stressed various aspects of that case which serve to distinguish it completely from the case at bar. Speaking for the Court, Mr. Justice Brennan pointed out that "Tennessee's standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties subject only to minor qualifications," that between 1901 and 1961 there had been no decennial reapportionment in compliance with the constitutional scheme even though Tennessee had experienced "substantial growth and redistribution of her population" and that the substance of the appellant's claim was that the existing (1901) reapportionment statute manifested an "irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population." *Id.* at 189-192, 207. *No such situation exists in the case at bar.*

Commenting upon the "gross disproportion" of representation mentioned above, Mr. Justice Douglas noted the assertion that "a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth eight times a single vote in Shelby or Knox County." *Id.* at 249. ***No comparable situation exists or is alleged to exist in the case at bar.***

With respect to the operation of the Tennessee reapportionment statute as applied to rural and urban areas of the State, Mr. Justice Clark observed that the statute "discriminates horizontally creating gross disparities between rural areas themselves as well as between urban areas themselves, still maintaining the wide vertical disparity already pointed out between rural and urban." *Id.* at 256. He also emphasized the "frequency and magnitude of the inequalities" in the Tennessee districting and the circumstance that the people of Tennessee would be "saddled with the present discrimination in the affairs of their State government" in the absence of federal judicial intervention. *Id.* at 259. ***No such situation exists or is alleged to exist in the case at bar.***

Finally, Mr. Justice Stewart reasserted the well established principles governing consideration of cases in which the validity of a State statute is challenged under the Equal Protection Clause of the Fourteenth Amendment, pointing out that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others" and that "the burden of establishing the unconstitutionality of a statute rests on him who assails it." *Id.* at 266. As previously noted in this statement, no proper application of these principles to the extensive evidence marshaled by the defendants was made, *or even attempted,* by the majority of the court below.

In *W. M. C. A., Inc.* v. *Simon, supra,* currently pending before this Court on appeal (No. 460, October Term, 1962), a three-judge District Court for the Southern District of New York sustained *on the merits* the validity of the reapportionment scheme embodied in the New York Constitution. Under New York law, every county in the State (with the exception of Hamilton County which shares one Assemblyman with Fulton County) is entitled to one representative in the New York Assembly. Senate districts for representation are created on the basis of citizen population, excluding aliens, with certain limitations upon the number of Senators any county may have.

Under this redistricting system, the largest New York Assembly district in population contained 222,261 inhabitants, and the smallest Assembly district in population contained 15,044 inhabitants—a population variance ratio of 14.7 to 1 between these districts. By contrast, the most excessive population variance ratio in the Virginia reapportionment system with respect to the House of Delegates is 4.36 to 1, based upon population figures *which include military personnel, their wives and children.*

Similarly, the largest Senate district in New York based on population contains 666,784 inhabitants, while the smallest Senate district in New York based on population contains 168,390 inhabitants—a population variance ratio of 3.96 to 1. By contrast, the most excessive population variance ratio under the Virginia reapportionment system with respect to the Senate of Virginia is 2.65 to 1, based upon population figures which again *include military personnel, their wives and children.*

The New York redistricting provisions were sustained by a unanimous court in a decision which, we submit, is thoroughly in accord with the settled course of decisions of this Court from *MacDougall* v. *Green,* 335 U. S. 281, to

Baker v. *Carr, supra.* Yet the Virginia reapportionment system was annulled in its entirety by a divided court, the majority of which did not even mention the New York case, despite the presence of an exhibit compiled by the Bureau of Public Administration of the University of Virginia analyzing the New York system in detail.

In *Sobel* v. *Adams*, 208 F. Supp. 316, a three-judge District Court for the Southern District of Florida, sustained *on the merits* the validity of the reapportionment scheme embodied in certain proposed amendments to the Florida Constitution to be submitted to the people for ratification. Under the proposed amendments, each county in Florida would be given one representative in the House of Representatives of the State Legislature, the remaining members to be allocated on the basis of representative ratios. The Senate would consist of forty-six members, each representing a district. Each of the twenty-four most populous counties in the State would constitute a Senate district, the other twenty-two districts to be created from the remaining forty-three counties.

Under this redistricting system, the largest population per representative in the Florida House of Representatives was 62,336, while the smallest population per representative in any district was 2,868—a population variance ratio of 21.7 to 1 between such districts. In Virginia, as previously pointed out, the most excessive population variance ratio with respect to the Virginia House of Delegates is 4.36 to 1. Similarly, the largest Senate district in Florida based on population contained 935,047 inhabitants, while the smallest Senate district in Florida contained 14,971 inhabitants—a population variance ratio of 62.4 to 1 between such Senate districts. In Virginia, as previously pointed out, the most excessive population variance ratio in the Senate of Virginia is 2.65 to 1.

Although the proposed amendments to the Florida Constitution were not adopted, the three-judge District Court, pointing out that it could not be said that the proposed amendments reached apportionment equality on a strict basis of population, unanimously sustained the reapportionment scheme contemplated by the proposed amendments.

Can it possibly be the law that a State reapportionment system which gives rise to extreme population variance ratios of 14.7 to 1 (New York) or 62.4 to 1 (Florida) are *not* invidiously discriminatory under the Fourteenth Amendment, but a State reapportionment system which gives rise to an extreme population variance ratio of only 4.36 to 1 (Virginia) *is* invidiously discriminatory? Can it possibly be the law that a State reapportionment system which causes a State to rank 13th in the United States in fairness of representation based *solely* on population (New York) is *not* invidiously discriminatory, but a State reapportionment system which causes a State to rank 8th in the United States in fairness of representation based *solely* on population *is* invidiously discriminatory? If such is the law, the decisions of the federal courts in reapportionment cases will themselves become a "topsy-turvical of gigantic proportions" and, in the absence of judicial guidelines enunciated by this Court to avoid such a result, those decisions will surely create a judicial "crazy quilt without rational basis." *Baker* v. *Carr, supra,* at 254. Appellants respectfully submit that the above-stated inquiries constitute substantial federal questions which should be considered by this Court.

Virginia's Overall Reapportionment Picture

In his opinion in the court below—post Appendix I—the dissenting judge canvassed the situation which has obtained with respect to reapportionment in Virginia and noted (1)

that Virginia—unlike the legislatures of many states—has consistently reapportioned its senatorial and house districts decennially in accordance with the mandate of Section 43 of the Virginia Constitution; (2) that other districts which may have been disadvantaged by the 1962 reapportionment "have not seen fit to attack the constitutionality" of the statutes in controversy; and (3) that if additional representatives were awarded to Fairfax, Arlington and Norfolk, such representatives "must be taken from other areas" and the court "would undoubtedly be faced with further litigation" by other districts.

Thereafter, the dissenting judge made the following pertinent observations and inquiries:

> "In my judgment the decision of the majority *places too much emphasis* upon the weighted vote of one county, city, or district as contrasted with the weighted vote in another county, city or district..
>
> * * *
>
> "Granting relief at this time without sufficient guidepost to govern our action *establishes a dangerous precedent.*
>
> * * *
>
> ". . . the mere failure to disprove discrimination by population does not, in my opinion, establish 'invidious' discrimination *when Virginia's overall picture is reviewed.*
>
> * * *
>
> "Virginia stands eighth in the nation in an index of representativeness among state legislatures as prepared by the Bureau of Public Administration of the University of Virginia subsequent to the passage of the 1962 Act. More proportionate representation is available only in Oregon, Massachusetts, New Hampshire, West Virginia, Maine, Wisconsin and Alaska. In determining whether the 1962 Reapportionment Act constituted 'arbitrary and capricious state action' or, as described

by the majority, 'invidious' discrimination, *are we to look at the entire pattern of apportionment or should we only consider apportionment of one district as against another? These are, in my judgment, unanswered questions.*" (Italics supplied).

In what manner should the Virginia reapportionment picture be viewed? In the event of a reaportionment which cures the discrimination found by the majority to exist with respect to Arlington, Fairfax and Norfolk, what are the rights of citizens of other areas to institute subsequent independent suits alleging invidious discrimination with respect to the districts in which they reside? If such additional suits may be instituted, then—as the dissenting judge of the court below inquired—"where is the stopping point" in reapportionment litigation? Counsel for appellants submit that the questions found by the dissenting judge to be unanswered by the majority opinion are substantially federal questions which should be considered by this Court.

CONCLUSION

In *Baker* v. *Carr, supra,* this Court held that the plaintiffs had set out in their complaint a justiciable cause of action which they had standing to maintain and the District Court had jurisdiction to hear. Individual members of this Court also reaffirmed various underlying principles applicable to litigation of this character in the following language:

"The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.' . . . Universal equality is not the test; there is room for weighting. (Id. at 244-245).

* * *

"No one . . . contends that mathematical equality among voters is required by the Equal Protection Clause. (Id. at 258).

* * *

"Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. (Id. at 258).

* * *

"Moreover, there is no requirement that any plan have mathematical exactness in its application. Only where, as here, the total picture reveals incommensurables of both magnitude and frequency can it be said that there is present an invidious discrimination. (Id. at 260).

* * *

"In MacDougall v Green, 335 US 281, 93 L ed 3, 69 S Ct 1, the court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.'" (Id. at 265-266).

In the *MacDougall* case, *supra*, at 283, this Court also emphasized:

"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government."

Against the background of these first principles the significant features of the case at bar stand out in bold relief:

1. The General Assembly of Virginia has consistently reapportioned the Commonwealth decennially in

accordance with the mandate of Section 43 of the Virginia Constitution.

2. Complete relief is available to the plaintiffs in the Supreme Court of Appeals of Virginia. In 1932, that Court (a) invalidated an enactment of the General Assembly of Virginia which failed to reapportion the Commonwealth for congressional representation according to population as required by Section 55 of the Virginia Constitution and (b) directed congressional elections for that year to be conducted on an "at large" basis.

3. The only discrimination alleged or attempted to be established by plaintiffs in the case at bar is one "exclusively of numbers" based solely on certain variances in population between districts. No suggestion is made that the challenged statutes discriminate against any individual, group or district upon the basis of race, creed, national origin, political persuasion or rural-urban character.

4. *Based solely on population,* Virginia ranks 8th in the United States in fairness of representation subsequent to the enactment of the challenged statutes. No reapportionment suit has been successfully maintained in any State having a higher rank on this index, while reapportionment systems of States having lower rank on such index have been judicially approved.

5. The most excessive population variance ratio in Virginia, *based solely on population,* does not exceed that which exists in the Electoral College of the United States.

6. The majority opinion of the court below made no reference to any factor other than population figures,

and gave no consideration to the factors of military personnel, relative size of various districts, number of political subdivisions in various districts or density of population in various districts.

When these significant features are viewed in the light of the "settled principles" applicable to litigation of this character, counsel for appellants submit that the substantial federal questions presented by this appeal should be accorded plenary consideration by this Court, with briefs on the merits and oral argument.

Respectfully submitted,

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PROOF OF SERVICE

I, R. D. McIlwaine, III, one of the attorneys for the appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1963, I served copies of the foregoing

Statement of Jurisdiction on the several appellees hereto by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows: Edmund D. Campbell, Esquire, Southern Building, Washington, D. C.; E. A. Prichard, Esquire, 106 N. Payne Street, Fairfax, Virginia; Sidney H. Kelsey, Esquire, 1408 Maritime Tower, Norfolk, Virginia; Henry E. Howell, Jr., Esquire, 808 Maritime Tower, Norfolk, Virginia; and Leonard B. Sachs, Esquire, Citizens Bank Building, Norfolk, Virginia.

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Assistant Attorney General